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Chairman: Mr. Lelong ..... (Haiti)

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01-61710 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10)

1. **Ms. Quesada** (Chile), referring to the topic "Responsibility of States for internationally wrongful acts", expressed her approval of the new title the International Law Commission had given the topic in order to distinguish that type of responsibility not only from the responsibility of the State under internal law but also from liability entailed by acts not prohibited by international law. Likewise, she welcomed the new order of the articles in Part One, in which article 7 was in its logical place following articles 4, 5 and 6. She was also pleased to note that at its latest session, the Commission had taken account of the observations which States had addressed to the Sixth Committee.

2. Turning to the question of serious breaches of obligations under peremptory norms, she said that significant progress would have been made in the development of international law if it had been possible to retain the norm embodied in former article 19, which had referred to international crimes and delicts. She had to admit, however, that that norm was perhaps too far ahead of its time to secure a consensus among States and would have led to considerable practical difficulties. For that reason she had taken note of the notion of "serious breaches of obligations owed to the international community as a whole" proposed by the Commission in 2001 to replace the distinction between crimes and delicts and since amplified by the Commission in the light of the discussion in the Sixth Committee.

3. Recalling that at the previous session of the General Assembly she had expressed a preference for the formula "international community *of States* as a whole" rather than "international community as a whole", she noted with satisfaction that reference was no longer made to the international community in the title of chapter III, which had been changed by the Commission and was now more acceptable. However, it was clear from the commentary that the Commission had *implicitly* retained the concept of "international community as a whole" in several provisions. Furthermore, the concept was *explicitly* retained in article 48 relating to the invocation of responsibility by a State other than an injured State. It was imperative that the concept of the obligation breached should refer to an obligation owed to the international community *of States* as a whole, a more precise concept which had been embodied in the Vienna Convention on the Law of Treaties.

4. Her delegation disputed the validity of the idea that a breach must be serious for the provisions of Part Two, chapter III, to take effect, despite the specific commentary in which the Commission sought to justify that idea by explaining that the word "serious" meant that a certain order of magnitude was necessary to avoid abusive recourse.

5. Such a distinction was unjustified. Any breach of a peremptory norm of general international law must be considered to be serious and to entail the responsibility of the State. The fact that Part Two, chapter III, established a distinction according to whether a peremptory norm was breached "in a gross or systematic manner" or not seriously affected the concept of *jus cogens*, since it could serve to legitimize "non-serious" breaches. Also, as other delegations had observed, that distinction was difficult to establish in practice, particularly because no authority was empowered so to do.

6. She also wondered whether the concept of a serious breach, originally developed primarily as a response to the needs of Part Two, chapter III, would not conflict with article 2, which included among the elements of an internationally wrongful act "a breach of an international obligation of the State" without in any way qualifying such breaches. Furthermore, under article 1, *every* internationally wrongful act of a State entailed the international responsibility of that State.

7. Paragraph (13) of the commentary to article 41, which stated that "a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapter I and II of Part Two" (arts. 29-38), supported her delegation's view that article 40 might be misinterpreted and, as one delegation had noted, might even be interpreted in the opposite sense to mean that the legal consequences envisaged in Part Two would take effect only in the case of a serious breach.

8. Turning to article 54, and recalling the criticism prompted by its wording in the draft proposed by the Commission at its fifty-second session, she welcomed the fundamental changes that had subsequently been made. Rather than a provision on countermeasures, it

had become a saving clause recognizing that States having a legal interest in an obligation that had been breached and entitled to invoke the responsibility of another State under article 48 had the right to take lawful measures against that State to ensure cessation of the breach and reparation. As such, it was acceptable.

9. Her delegation had endorsed the Commission's decision at its previous session not to include specific provisions on dispute settlement in the draft articles. She remained convinced that the issue should be addressed in the context of a specific, detailed study rather than of a document on responsibility, where it might hinder approval and implementation.

10. Lastly, she considered that the draft articles contained a well-constructed, balanced, exhaustive and consistent text and supported the idea of recommending that the General Assembly should take note of them in a resolution, annexing them thereto. However, she stressed that the subject of State responsibility should not be abandoned and that the General Assembly should not merely take note of the draft articles, but also recommend that States should consider them carefully and keep the matter under review with a view to the conclusion of a convention in the future.

11. **Mr. Prandler** (Hungary) said he firmly believed that, once concluded, the draft articles on the responsibility of States for internationally wrongful acts would rank among the outstanding instruments and important conventions adopted by the Commission. Turning to procedural issues, he expressed support for the Commission's recommendation that the General Assembly should take note of the draft articles in a resolution and did not rule out the possibility of convening an international conference of plenipotentiaries in a few years; however, he warned against a premature decision that might unravel the compromise package that had been achieved.

12. Although Governments had not yet been able to study the Commission's report, he was not convinced that a new exchange of views would enhance the coherence and logic of the existing text. Certain articles could doubtless be improved but in the case at hand, it might be best to take the approach followed with the Convention on the Law of the Sea by considering the text as a whole to be acceptable insofar as it represented a minimum level of consensus and therefore an acceptable balance between the different points of view.

13. Thus, the real question was whether the draft articles as a whole represented a minimum level of acceptance. His delegation believed that the document reflected both generally accepted norms of customary international law and emerging rules of the progressive development of international law. To defer action on that issue by the General Assembly would not do justice to the excellent work of the Commission.

14. With respect to substantive issues and to the possibility of leaving certain issues to the discretion of a diplomatic conference, he recalled that the previous year his delegation had strongly supported the inclusion of provisions on dispute settlement in the draft articles. However, it had changed its position since the majority of delegations did not believe that such provisions would be useful; there was a plethora of other methods available for the peaceful settlement of disputes, beginning with Article 33 of the Charter of the United Nations. At the current juncture, the issue was not the establishment of machinery for the settlement of disputes in the context of the draft articles, but rather whether States had the political will to accept the existing methods, including compulsory machinery.

15. One of the major changes which had been made to the text, and which his delegation supported, was the deletion of the notion of "international crime", contained in the former article 19 of the draft articles, prompted by the acceptance of individual criminal responsibility as defined in the Rome Statute of the International Criminal Court, and based on the concept of serious breaches of peremptory norms and of obligations owed to the international community as a whole. Despite the doubts expressed by some delegations concerning the nature and actual manifestations of such serious breaches, his delegation supported the introduction of the concepts of "serious breaches" and "peremptory norms" (*jus cogens*) into the draft articles. His delegation was satisfied with the explanations and examples given in the commentary to draft article 40, and only wished to add to the list Articles 1 and 2 of the Charter of the United Nations, as well as the basic provisions of international humanitarian law and the law of diplomatic relations.

16. He drew attention to article 48, paragraph 1 (b), according to which States were entitled to invoke the

responsibility of another State if the obligation was owed to the international community as a whole. That provision was based on the "essential distinction" established by the International Court of Justice between obligations owed to particular States and those owed to the international community as a whole. The latter were obligations *erga omnes*, a term which had not been used in the draft articles so that it would not be necessary to provide a list of such obligations.

17. His delegation reiterated its conviction that the draft articles could serve as a "code of conduct" on matters of State responsibility. State practice and the practice of international organizations would endorse the most important provisions of the draft or lead to further changes. In any case, the International Law Commission and the General Assembly were making available to States an important "code of conduct" and it was to be hoped that the text would help to consolidate the rules which should be adhered to by the actors of the international community as a whole.

18. **Mr. Hmoud** (Jordan), emphasizing the considerable importance of the draft articles on the responsibility of States to the international community, expressed the hope that the text would strengthen the rule of law by establishing rules which would be clear and not arbitrary, and would constitute an authoritative source.

19. The text had been greatly improved relative to the previous draft, better reflecting the practice of States on the doctrine of "State responsibility". However, it was regrettable that the initial progressive development approach had been abandoned, since it would have strengthened the legal regime of the draft articles.

20. With particular reference to the provisions on countermeasures, he recalled that his delegation considered the legal regime on countermeasures as a safeguard against the adoption of political and arbitrary countermeasures which might undermine the principle of sovereign equality. The regime, as defined in the draft articles, could also secure compliance with international obligations and act as a deterrent to wrongdoing. It was however regrettable that there was no provision concerning unnecessary or disproportionate countermeasures which might be taken by an injured State, although it could be supposed that the dispute settlement safeguards together with the countermeasures provisions would restrict the scope for abuse.

21. Apart from minor editing changes, the main departure from the previous version of the text was the replacement of the article on "collective" countermeasures with a saving clause under article 54. Having previously expressed concern over the proportionality of countermeasures that could be taken by any State against the perpetrators of serious breaches of essential obligations towards the international community, his delegation noted that under the current saving clause, the right of "any" State to take "lawful" measures was maintained in the case of obligations *erga omnes*, and was even extended to all obligations the violation of which justified recourse to countermeasures. His delegation feared that the principle of proportionality might be undermined if any State or group of States not acting in concert would be free to take whatever countermeasures it deemed appropriate. Article 54 should therefore be deleted and the regime of collective measures should be studied and codified in the future, for the following reasons: firstly, to prevent abusive recourse to the right of retorsion; secondly, to enable a group of States to induce the State responsible for a wrongful act contrary to treaty obligations or customary international law to cease such act and repair the damage; and lastly, to deter serious violations of obligations owed to the international community as a whole by obliging the latter to take positive action when such violations occurred. Such actions were an obligation, rather than a matter for the discretion of the international community, particularly when violations of human rights or humanitarian law were concerned.

22. His delegation understood that it had been necessary to retain the concept of *actio popularis* in articles 41 and 48, in the light of the deletion of the former article 19 on State crimes. However, given the complexity of that concept, which might prejudice general acceptance of the draft articles, a definition of the act might not be necessary, provided that its elements and consequences were codified in a sufficient and effective manner.

23. Noting that the draft articles now referred to serious breaches of peremptory norms of international law, he agreed that there was substantial overlap in judicial decisions and in the writings of jurists between obligations *erga omnes* and the rules of *jus cogens*. To the extent that that was also true in practice, his delegation accepted the replacement of obligations *erga omnes* by the rules of *jus cogens*.

24. The reference in chapter III to the regime of *actio popularis* was necessary, taking into account the deletion of the reference to international crimes of States and the need to set out the consequences of serious breaches in terms of obligations incumbent on States rather than States' prerogatives, especially if the aim was to bring an end to the breach and to restore legality. Furthermore, article 41 did not call into question the competence of the Security Council with respect to maintaining international peace and security, since article 59 specified that the draft articles were without prejudice to the Charter of the United Nations; indeed, article 41 could prove particularly useful if the Council decided not to intervene.

25. His delegation considered that the invocation of responsibility by a State other than an injured State (art. 48) should not be confused with the "consequences" of a serious breach of a peremptory norm (art. 41) because their legal effects were different, albeit not contradictory. The regimes referred to in the two articles coexisted, even when the wrongful act leading to the application of the two articles was the same.

26. Noting the deletion of the reference in article 41 to aggravated (or punitive) damages, which, in his opinion, could have acted as a deterrent, he said that he recognized that confining damages to those that were compensatory in nature had undoubtedly facilitated the general acceptance of the draft articles.

27. He supported the compromise reached by the Commission on dispute settlement, whereby the issue would be dealt with in the General Assembly decision concerning the form of the draft articles. If the Assembly decided to adopt a convention, it would have to provide for the establishment of a mechanism to settle disputes arising in the application or interpretation of those provisions.

28. Although his Government supported the adoption of an international convention, it was ready to accept the solution proposed by the Commission, consisting in the adoption by the General Assembly of a resolution taking note of the draft articles, the text of which would be annexed to the resolution, and the subsequent convening, at the earliest opportunity, of an international conference to adopt the draft articles in the form of a convention. Whether they were adopted in an annex to a resolution or took the form of a convention, the draft articles should be authoritative in the area of State responsibility. In conclusion, he mentioned instances in which the draft articles had already been quoted. In that connection, it was encouraging to note that they had already been invoked before the International Court of Justice in the *La Grand* case.

29. **Mr. Kittichaisaree** (Thailand) expressed satisfaction that the draft articles on State responsibility reflected fairly the views of Governments and members of the Commission, and customary international law. He welcomed the change in the title from "State responsibility" to "Responsibility of States for internationally wrongful acts", which removed from the scope of application of the text the responsibility of States under internal law.

30. His delegation generally supported the draft articles and appreciated, in particular, the precision with which the conditions for recourse to countermeasures were defined. It was concerned, however, about the vagueness of the concept of obligations "owed to the international community as a whole"; it was to be hoped that, in time and as a result of State practice, the meaning of the concept would be clarified.

31. Regarding the replacement of article 54 (Measures taken by States other than an injured State) by a saving clause, his delegation regretted the lack of specificity of the provisions relating to the nature and scope of "lawful measures", a problem that was supposed to be solved with the development of international law, and it was concerned about the possible abuse of such measures.

32. He welcomed the changes made to part two, chapter III, especially in the light of the absence of a reference to "international crimes of States". Thus, the decision to retain only serious breaches of obligations under peremptory norms of general international law was welcome, although the concept of "serious breaches" was somewhat vague and open to different interpretations. Finally, the deletion of article 42, paragraph 1, was appropriate because the concept of "punitive" damages was not recognized in international law.

33. His delegation was concerned about the lack of provisions on dispute settlement, the inclusion of which in the draft articles should not be left to the discretion of an international conference that might or might not be convened. There was a need to refer to the

obligation to settle disputes by peaceful means, in accordance with Articles 2 and 33 of the Charter of the United Nations, or to revert to the mechanism proposed on first reading.

34. He reiterated his opposition to the continuation of the negotiations on the draft articles in the context of a diplomatic conference, which could last several years and undermine the compromises reached, without facilitating the ratification of the text. Consequently, he supported the Commission's recommendation that the draft articles should be adopted and included in a General Assembly resolution in order to expedite their entry into force in relations between States.

35. **Ms. Cavaliere de Nava** (Venezuela), addressing the first topic, "Responsibility of States for internationally wrongful acts", said that the work of the Commission should result in the conclusion of a convention. She was not opposed to the proposal that the draft articles should be approved and annexed to a General Assembly resolution, provided that the proposal was part of a process leading to the adoption of a treaty.

36. In general, her delegation considered that the draft articles prepared by the Commission were acceptable, as the right balance had been struck between customary law, international practice and the development of international law and international relations; the Commission had produced a text whose value had already been recognized not only in the writings of jurists but also in a juridical context, since international tribunals had already referred to it.

37. Commenting on various aspects of the draft, she emphasized the importance of part three, chapter II; the principle that countermeasures might be justified had been recognized by States and by international tribunals, and the formulation of precise and balanced rules on the subject would help to ensure judicious recourse to such measures and prevent the ever-present risk of abuse. The purpose of countermeasures was not to punish the wrongdoing State but to induce it to comply with the obligation that had been breached. The Judgment of the International Court of Justice in the *Gabčikovo-Nagymaros Project case* was clear: an injured State could resort to countermeasures, only in reaction to a wrongful act and the countermeasures must, moreover, be adapted to the circumstances.

38. The possibility for an injured State to take countermeasures against the responsible State in order to induce it to comply with its international obligations should be subject to the obligation of proportionality and to the conditions enumerated in draft article 52. Moreover, that possibility disappeared as soon as the breach of the international obligation had ceased or when the dispute was submitted to an international court or tribunal, notwithstanding the provision relating to the preservation of the rights of the injured State set forth in article 50, paragraph 2, since that could be ensured in the framework of the judicial procedure relating to the dispute. In that connection she welcomed the exception contained in paragraph 4, which envisaged cases in which the injured State failed to implement the dispute settlement procedures in good faith.

39. Part two, chapter III dealt usefully with serious breaches of obligations under peremptory norms of general international law; in particular, articles 40 and 41 rightly took up the distinction between obligations *erga omnes* and specific obligations established by the International Court of Justice in the *Barcelona Traction* case. The draft articles should confirm that any State was entitled to invoke the responsibility of another State in the event of a breach of an obligation owed to the international community as a whole as indicated in article 48, paragraph 2.

40. Turning to the topic "Reservations to treaties", she reaffirmed that conditional interpretative declarations were similar to reservations, in particular with respect to their effects, and therefore came under the Vienna regime. For that reason, conditional interpretative declarations had no place in the Guide to Practice on which the Commission was currently working.

41. One of the more complex questions considered by the Commission in that context concerned the late formulation of reservations, dealt with in draft guideline 2.3.1, which provided that, in accordance with the principle *pacta sunt servanda* and the principle of the stability of legal relations between States, a State or international organization could not formulate a reservation to a treaty "after expressing its consent to be bound by the treaty", except "if none of the other contracting Parties objects to the late formulation of the reservation". Although that rule had been recognized in the 1969 and 1986 Vienna Conventions and in judgments of the International Court of Justice, in particular in the *Border and Transborder Armed Actions* case, it had no public

policy value in that the States parties to a treaty could make exceptions to it. The Commission had therefore performed a useful task by developing a guideline along those lines. Moreover, the word "objects" used in draft guideline 2.3.1 was particularly appropriate in that it related not only to the substance of the reservation but also to the date on which it was formulated.

42. The functions of a depositary, which were the subject of articles 77 and 78 of the 1969 Vienna Convention, were to communicate to the other parties any reservation formulated or submitted by a State, and it was for the parties to determine whether such reservation was admissible or not. The depositary therefore performed essentially an information function rather than a decision-making function.

43. The term "formulation" was used in the context both of reservations and interpretative declarations and of unilateral acts of States, but in the context of interpretative reservations and declarations, "formulating" a reservation did not necessarily imply that the reservation would have legal effects, since the other contracting Parties might object to it. In the case of unilateral acts of States, the Commission used the word "formulate" in a different sense. Indeed, a State that formulated a unilateral act was thereafter bound by the obligation thus created, subject to certain conditions, without it being necessary for that purpose that the addressee or addressees of the act in question should react. In that context, therefore, there was a close link between "formulation" and the production of legal effects.

44. The meaning of the word "formulate" did not therefore appear to be the same in the context of reservations or in that of unilateral acts. In order to avoid confusion, it would be advisable to revise the terminology employed by the Commission with a view to achieving greater coherence and clarity.

45. As for unilateral acts of States, although the work of the Commission was not proceeding as swiftly as it should, progress had nonetheless been made in considering such fundamental questions as the definition and classification of such acts, the organization of the draft articles and so on.

46. In organizing the draft articles, efforts should be made to classify unilateral acts on the basis of criteria such as content and legal effects. Without adequate classification, the development of rules in that connection would be impossible.

47. Her delegation believed that it should be possible to establish common rules concerning the definition, formulation and interpretation of unilateral acts. The same did not apply, however, to their legal effects, in view of the diversity of such effects.

48. Notwithstanding the Commission's unsuccessful attempts to reach final conclusions on that subject, it should still be able provisionally to develop a classification based on the criterion of legal effects that would allow it to organize the draft articles in a satisfactory manner and thus move forward.

49. In order to formulate general rules, it was clearly essential to be aware of State practice. The Commission, however, had not received the necessary information in that connection, and she therefore hoped that Governments would in future respond to any questionnaires sent to them, particularly that compiled by the Commission in 2001 and circulated by the Secretariat some weeks earlier.

50. Her delegation would in due course communicate its views on international liability for injurious consequences arising out of acts not prohibited by international law (in particular prevention of transboundary harm from hazardous activities) and on diplomatic protection.

51. **Mr. Bocalandro** (Argentina), speaking on agenda item 162, said he approved of the manner in which the Commission had sought and taken into account the views and recommendations of States with the aim of formulating the draft articles on Responsibility of States for internationally wrongful acts; its approach had not only promoted general acceptance of the draft articles and their commentaries but had also enhanced their quality and usefulness. With reference to the significant improvements and amendments made to the draft articles on second reading, in particular the provisions relating to the invocation of international responsibility, he welcomed the change of attitude adopted vis-à-vis the responsible State. As a result, the draft articles now attached greater importance to the right of a State to invoke responsibility and established a distinction between the injured State and other States having a legitimate interest in exacting performance of the obligation breached, thus further clarifying the rules applicable to the invocation of responsibility and rendering them more coherent.

52. He also approved of the manner in which the Commission had dealt with the question of serious breaches of obligations under peremptory norms of general international law. In that connection, he was also pleased to note the Commission's reaffirmation that the principles of *jus cogens* contained in the 1969 Vienna Convention on the Law of Treaties formed the basis of the modern international legal order. Inclusion of the idea of serious breaches and their consequences was a first major step towards greater recognition and protection of the higher values and interests of the international community as a whole. In future, that idea would certainly benefit from further development and strengthening, in view of the increasing integration of international society and its ensuing need for more effective jurisdictional instruments aimed at promoting respect for law in general.

53. Concerning the delicate issue of countermeasures, his delegation remained firmly convinced that such measures should be taken only in exceptional circumstances with the sole aim of ending a breach of obligation and guaranteeing reparation. In that regard, he endorsed the rules proposed by the Commission, which were balanced and conducive to limiting any resort to countermeasures, as well as to preventing any abuse. He also welcomed the decision not to incorporate into the draft articles the idea of collective countermeasures.

54. Lastly, he shared the Commission's view that the draft articles should first form the subject of a resolution to be adopted by the General Assembly at its current session in which it would note with satisfaction the excellent work achieved by the Commission. The resolution would also include the draft articles as an annex and recommend that Member States should consider them and, together with the institutions concerned, disseminate them as widely as possible with the aim of increasing knowledge and understanding of their content and promoting their application in international practice and in case law. Secondly, as proposed by the Commission and as the General Assembly should request in its resolution, consideration should be given to transforming the draft articles into a convention to be adopted at a future diplomatic conference on codification. To that end, the topic should remain on the agenda of the forthcoming sessions of the Committee, which should closely monitor the impact of the publication of the draft articles in the Member States and ascertain that conditions were right for the convening of the said conference.

55. **Ms. Čačić** (Croatia) said that international law was not a static phenomenon; in the area of State responsibility, the focus was now more on the collective interest and the protection of certain values shared by the international community as a whole, imposing obligations *erga omnes*, whereas earlier it had concentrated on the protection of strictly bilateral rights and duties. The Commission had recognized that shift, particularly within the context of article 48, which dealt with the obligations owed to the international community as a whole.

56. It had been claimed that the formulation of the draft articles involved not only codification, but also the progressive development of law. It was clearly impossible to codify law without some reinterpretation and restructuring, but the Commission had stayed on the side of codification. Some concepts, such as the concept of State crimes, which was too new and controversial, had been abandoned, while others, such as countermeasures, had been re-examined and streamlined, and the result was a well-balanced and well-defined text which accurately reflected the current status of international law, and commentaries which would be a valuable tool for the interpretation and implementation of the articles.

57. With regard to the form of the draft articles, her delegation endorsed the two-step approach recommended by the Commission, which had already been used in the case of the articles on the nationality of natural persons in relation to the succession of States. The General Assembly should take note of the draft articles in a resolution to which the draft articles would be annexed. That would be the simplest way of giving the draft articles the necessary recognition and publicity, while avoiding the risks of decodification that a premature formulation of a convention could entail, and the risk of the overall balance of the text being compromised by diplomatic negotiations. Eventually, the draft articles would have to be adopted in the form of an international convention, since they were a cornerstone of international law and should therefore be adopted in that form. They would then have binding force and would have a stabilizing influence on customary international law, like the Vienna Convention on the Law of Treaties.

58. Meanwhile, Governments and international judicial bodies should continue the process of endorsing and testing the draft articles and putting them into practice.

59. **Ms. Connelly** (Ireland) said that the draft articles were an important contribution to the codification of international law and also contained elements of progressive development for the guidance of States. Her delegation welcomed the draft articles but wished to make a few comments with a view to the future.

60. With regard to serious breaches of obligations under peremptory norms of general international law, her Government was pleased that its written observations had been taken into account by the Commission and that the concept of an international crime, which State practice did not support, had been replaced by that of a breach of an obligation to the international community as a whole. However, it had some doubts about the final text of part two, chapter III, which referred to "serious breaches of obligations under peremptory norms of general international law" rather than breaches of obligations to the international community as a whole. All breaches of peremptory norms of general international law were by their very nature serious. Furthermore, reference was made elsewhere in the draft articles to breaches of obligations owed to the international community as a whole without clarifying the relationship between those breaches and the breaches referred to in part two, chapter III. Thus, under article 48, any State was entitled to invoke the responsibility of another State which had breached an obligation owed to the international community as a whole and to claim from that State the cessation of the internationally wrongful act and assurances and guarantees of non-repetition as well as the performance of the obligation of reparation. Yet part two, chapter III did not explicitly deal with the invocation by any State of the responsibility of another State for a serious breach of an obligation arising under a peremptory norm of general international law. The commentary seemed to imply that breaches of obligations owed to the international community as a whole included breaches (whether serious or not) of obligations under peremptory norms of general international law and that in the latter instance, any State could invoke cessation and claim guarantees. If that interpretation was correct, the rule should be made explicit, and not implied from a reading of separate provisions. Since they were in different parts of the text, the articles could be interpreted to mean that different legal regimes were meant to operate depending on the type of breach. It would be worth giving further thought to the relationship between the responsibility of States flowing from breaches of obligations under peremptory norms and those flowing from breaches of obligations owed to the international community as a whole.

61. Turning to the subject of countermeasures, she said that the aim was to allow States to defend their rights, yet subject to conditions which prevented abuse. Any decision to take countermeasures was by its nature unilateral, the wronged State being solely empowered to adjudge the acts of another State, its responsibility, the applicable law, and the appropriate response; it was important that limits should be placed upon such power. In that regard, her delegation considered that chapter II of Part Three provided realistic standards for States to follow. However, her delegation regretted the absence of an explicit reference to the need to protect third parties from any adverse effects of countermeasures taken against a wrongdoing State. Paragraph 1 of article 49 provided that an injured State might take countermeasures against a State which was responsible for an internationally wrongful act only in order to induce that State to comply with its obligations. The restriction applied as much to the target of the countermeasures as to their purpose: countermeasures must not be directed against States other than the responsible State. In a situation where a third State was owed an international obligation by the State taking the countermeasures and that obligation was breached by the countermeasures, the wrongfulness of the measures was not precluded as against the third State. In its commentary, however, the Commission recognized that countermeasures might incidentally affect the position of third States or other third parties. If such indirect effects could not be entirely avoided, the law, at least by way of progressive development, should surely seek to minimize such negative effects. The addition of a provision to that effect in the draft articles would conform to the spirit of Article 50 of the Charter of the United Nations, which enshrined the principle that third parties must be protected from the indirect effect of measures taken against other States.

62. Finally, with regard to the form the draft articles should take, her delegation was of the opinion that rather than proceeding in the direction of codification,

Member States should reflect on the draft articles and incorporate the progressive elements in their own practice or not as they deemed appropriate. In fact, the process necessary for the adoption of a convention might run the risk of weakening the balance struck by the Commission and would entail the reopening of the debate on a number of complicated and sensitive issues that had been settled with great difficulty. She therefore felt that the General Assembly should take note of the draft articles in a resolution to which the draft articles would be annexed. That resolution might, however, be worded in more positive terms, with the General Assembly taking note with appreciation of the draft articles and commending them to Member States for their consideration. Her delegation considered that the draft articles should be adopted by the end of the year. As for the decision to convene an international conference of plenipotentiaries to consider the draft articles with a view to concluding a convention, that should be a decision for another day.

63. **Mr. Krokhmal** (Ukraine) said that the responsibility of States for internationally wrongful acts was a topic of the utmost importance, which had been significantly furthered by the well-balanced and well-structured provisions of the draft articles presented by the Commission. However, it would be premature to discuss the issue of convening a conference to consider the adoption of the draft articles in the form of a convention at the present stage. Time should be given for States to examine them in depth and for international practice to develop. The topic of the responsibility of States for internationally wrongful acts should therefore be placed on the agenda of the General Assembly at its next session and should be considered on that occasion, taking into account comments made in the meantime by Member States. To that end, his delegation was prepared to support the adoption of a General Assembly resolution to which the draft articles would be annexed.

64. Diplomatic protection and reservations to treaties were also topics of great importance to his delegation, which hoped that the Commission's work on them would lead to the adoption of instruments of codification which were based on international practice and whose correctness was universally recognized. In that connection, one of the most controversial aspects of diplomatic protection was its relationship to the protection of human rights. Of course, in the case of gross violations of human rights guaranteed by *erga omnes* rules of international law, the State of nationality and other members of the international community had the right to intervene. But in other cases there had to be an injury, in other words an internationally wrongful act for which it had not been possible to obtain satisfaction through domestic legal remedies. Ignoring that rule of customary international law would amount to questioning the very bases of diplomatic protection, which was not primarily a human rights instrument.

65. His delegation believed that the threat or use of force should not be regarded as lawful means of diplomatic protection, and the same was true of reprisals, retortion, severance of diplomatic relations and economic sanctions. So-called humanitarian intervention was sometimes no more than a pretext for an abuse of the use of force. Diplomatic protection should be the initiation of a procedure for peaceful settlement of a dispute, and the use of force was only justified in legitimate self-defence. Any other interpretation would cast doubt on the basic principles of international law set forth in the Charter of the United Nations.

66. Diplomatic protection should never be confused with the right to use force in defence of the rights of nationals. Rather, it was a State prerogative recognized under international law, which a State might exercise or not, at its discretion, on behalf of its nationals. By nationals should be meant the persons who had acquired the nationality of a State in accordance with its national law.

67. His delegation believed that the effective link concept should be based on birth, descent or naturalization but not on habitual residence. The concept was relevant only between two or more States which might exercise diplomatic protection on behalf of a national, not of a mere resident. It would be helpful if the Commission could define the concept of an effective link more precisely to avoid ambiguity.

68. Lastly, neither the 1951 Convention relating to the Status of Refugees nor the 1961 Convention on the Reduction of Statelessness said anything about requiring States to exercise diplomatic protection on behalf of refugees or stateless persons, and it was difficult to envisage the circumstances under which such an obligation might be imposed. According diplomatic protection to those categories of persons would place an additional burden on States.

69. On the subject of reservations to treaties, Ukraine, as a contracting Party to the 1969 and 1986 Vienna Conventions on the Law of Treaties, supported the traditional interpretation of those conventions whereby late reservations, alternatives to reservations, interpretative declarations and modification of reservations could not be considered reservations in the sense of articles 19 to 23 of the 1969 Vienna Convention. Moreover, modifications to reservations that did not constitute a withdrawal or partial withdrawal should be considered new reservations requiring the acceptance of the contracting Parties.

70. With reference to the decision of the Secretary-General to extend the 90-day period in which the parties could object to late reservations or modifications of reservations and to make it 12 months, his delegation felt that the practice must be compatible with articles 77 and 78 of the 1969 Vienna Convention, unless the treaty provided otherwise, and the absence of an objection formulated by Ukraine to such reservations in the above-mentioned period should not be interpreted as its tacit consent.

The meeting rose at 5.10 p.m.